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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 222

ATLAS-PACIFIC ENGINEERING COMPANY,
a corporation,
Petitioner,

vs.

GEO. W. ASHLOCK COMPANY,
a corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

FRANK A. NEAL,
1650 Russ Building,
San Francisco 4, California,
Counsel for Respondent.

JAMES M. NAYLOR,
KARL A. LIMBACH,
1650 Russ Building,
San Francisco 4, California.
Of Counsel.

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INTRODUCTION

Petitioner has filed a Reply Brief and a Supplemental Brief.

Reference herein is made to Petitioner's Reply Brief only for the purpose of directing this Court's attention to the fact that pages 1154 and 1155 of Vol. 10 of the

transcript of the record before the District Court do not appear in the record certified to this Court and on file therein. Nevertheless, Petitioner, at pages 6-7 of its Reply Brief, refers to these pages 1154-1155 and quotes verbatim passages from them.

The balance of this Supplemental Brief in Opposition will be directed to replying to Petitioner's Supplemental Brief.

THE CONCURRENT HOLDINGS OF THE COURTS BELOW ON APPORTIONMENT TURN SOLELY UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED

At pages 5 and 6 of its Supplemental Brief Petitioner states the following: that the apportioning of damages is a difficult matter; that the District Court below said that it was difficult to apportion damages in the present case; and that the Court of Appeals, by way of affirming the District Court, also said that it was difficult to apportion damages in the present case. From such statements the Petitioner implies that the holdings below concerning apportionment are contrary to the public interest, concludes that *Brulotte v. Thys Co.*, 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99, has been thwarted, and urges that in connection with the present case this Court should either provide guidelines to lessen the task of apportionment or tell the lower Courts that apportionment should be carried out regardless of difficulty. There is no truth or merit to any of this except, possibly, Petitioner's general statement that the apportioning of damages is a difficult matter.

In actuality the concurrent holdings of the Courts below in refusing to apportion damages are holdings, based upon particular facts involved, that the present case is not one calling for apportionment of damages. It cannot validly be contended that these holdings of the Courts below signify that apportionment is in order but is denied because of the difficulties involved. But Petitioner so contends.

It is enabled to so contend by focusing attention, at page 5 of its Supplemental Brief, on the first sentence of Finding of Fact No. 28 (Appendix to Petition, pages 27 and 28), i.e.

> "28. The Court finds that it is neither possible nor practical to separate the parts from the whole of the overall Ashlock olive pitting machine for the purpose of assessing damages on an apportionment basis."

It would appear that Petitioner equates the words "neither possible nor practical" with the word "difficult". When the balance of Finding of Fact No. 28 is examined it becomes clear that the Courts below have held that, on the facts presented, the present case is not a proper one for apportionment of damages. The balance of Finding of Fact No. 28 reads as follows:

> "Aside from the elements defined in Claim 11 as constituting the subject matter thereof, an overall Ashlock olive pitting machine is further constituted by a feed hopper into which the olives to be pitted are delivered in bulk, a pick-up conveyor which serves the purpose of transferring the olives from the feed hopper to the conveyor recited in Claim 11, and vibrator means associated with the conveyor mentioned in Claim 11 to serve the purpose of causing

the olives within the receptacles of the conveyor of Claim 11 to work themselves into the desired pitting position wherein their long axes are disposed essentially vertically. The Court finds that in the absence of any of these further parts of the overall Ashlock olive pitting machine any resulting version of a pitting machine would lack the usefulness of the overall machine in the hands of the Ashlock lessees and thus not be desirable to the lessees from the practical aspect of commercial production use. Mr. Margaroli's testimony was to the effect that none of the plaintiff's lessees had ever to his knowledge requested the lease of less than an entire olive pitting machine of the plaintiff or of the plaintiff's predecessors."

CONCLUSION

Petitioner's Supplemental Brief, when considered along with the foregoing, further indicates that Question No. 2 of the Petition is lacking in merit and substance with reference to the facts of this case.

Dated, San Francisco, California,
September 21, 1965.

Respectfully submitted,
FRANK A. NEAL,
Counsel for Respondent.

JAMES M. NAYLOR,
KARL A. LIMBACH,
Of Counsel.